

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STANLEY MOTHENE MILLER,

Defendant-Appellant.

UNPUBLISHED

January 24, 2006

No. 257929

Branch Circuit Court

LC No. 01-087368-FC

Before: Zahra, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from the sentence imposed by the trial court on resentencing after remand for three counts of first degree criminal sexual conduct, MCL 750.520b(1)(f). We vacate defendant's sentences and remand once again for resentencing.

At his original sentencing hearing, defendant's guidelines' minimum sentence range was calculated to be from 81 to 135 months. The trial court departed upward from this range, sentencing defendant to three concurrent terms of 32 to 55 years (384 months to 660 months). Defendant appealed. A panel of this Court affirmed defendant's convictions, but vacated his sentences after concluding that the trial court failed to articulate substantial and compelling reasons for its upward departure from the sentencing guidelines. *People v Miller*, unpublished per curiam opinion of the Court of Appeals, issued October 21, 2003 (Docket No. 240337), slip op at 9-10.

On remand, the trial court noted that, while it had declined to score offense variable ("OV") 7 at defendant's original sentencing, it would do so for purposes of resentencing because it recognized the implications of terrorism (as then defined as conduct designed to increase the anxiety or fear of the victim) in defendant's actions during the offense. As a result, defendant's minimum guidelines sentence range increased to 135 to 225 months.¹ The trial court then indicated that it found the guidelines to be "inadequate for the horror that was committed by [defendant] in this particular case." Specifically the trial court noted, "that the guidelines are inadequate in dealing with multiple sexual penetrations and contemporaneous criminal acts"

¹ We note that the trial court incorrectly stated this revised range as 126 to 210 months.

perpetrated by defendant against the victim; that is, the guidelines “did not take into account sufficiently the multiple sexual penetrations . . . [and] they did not take into account the contemporaneous criminal acts that occurred.” After considering defendant’s good institutional behavior since the original sentencing, the trial court again departed upward, resentencing defendant to three concurrent terms of 30 to 55 years (360 months to 660 months).

Defendant argues that the trial court failed to articulate substantial and compelling reasons justifying its upward departure from the guidelines recommended minimum sentence range. We agree.

A court may depart from the guidelines recommended sentencing range if it articulates on the record a substantial and compelling reason for that departure. MCL 769.34(3). However a court “shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.” MCL 769.34(3)(b). The trial court’s determination that a particular factor exists is a factual determination subject to review for clear error. Whether a particular factor is objective and verifiable is a question of law reviewed de novo. The trial court’s determination that objective and verifiable factors constitute substantial and compelling reasons for departure from sentencing guidelines is reviewed for an abuse of discretion. Finally, the degree of any departure is also reviewed for an abuse of discretion. *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995); *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003).

As noted above, at defendant’s resentencing, the trial court revised defendant’s guidelines scoring to include fifty points for OV 7 for his terrorism of the victim. This raised defendant’s total OV score from 55 to 105 and increased defendant’s OV level from V to VI. Defendant’s prior record variable (“PRV”) score of twenty-two placed him at PRV level C. As a result, defendant’s revised guidelines recommended minimum sentence range, following the rescoring of OV 7, was 135 to 225 months, the maximum guidelines range provided for any offender with defendant’s criminal history. MCL 777.62. The trial court departed upward in sentencing defendant based on its belief that defendant’s multiple penetrations of the victim were given inadequate weight by the guidelines, under OV 11 (for multiple penetrations) and OV 12 (for contemporaneous criminal acts), given the circumstances of the instant offense.

OV 11 is to be scored at fifty points if there were two or more criminal sexual penetrations arising out of the sentencing offense; but is not to be scored for the one penetration that forms the basis of a first-or third-degree criminal sexual conduct offense. MCL 777.41. At defendant’s sentencing, the trial court noted its belief that OV 11 could not be scored in this case because defendant had been separately convicted of one count of CSC I for each of the three penetrations established at trial. The trial court was apparently unaware of this Court’s decision in *People v McLaughlin*, 258 Mich App 635; 672 NW2d 860 (2003)², in which we determined

² We note that the prosecutor apparently also was unaware of *McLaughlin*, and agreed with the trial court that OV 11 could not be scored in this case.

that multiple penetrations arising from the sentencing offense can be scored under OV 11, even where they also form the basis for a separate sentencing offense. Thus, the trial court clearly could have scored OV 11 at fifty points, reflecting the two penetrations defendant inflicted on the victim in addition to the penetration forming the basis for each sentencing offense. Thus, the trial court's reasoning that OV 11 was inadequate to account for the multiple penetrations of the victim was based on a misapprehension of applicable law.

OV 12 provides for the scoring of contemporaneous felonious criminal activities that *have not and will not result in a separate conviction*. MCL 777.42 (emphasis added). Thus, the trial court correctly concluded that defendant's separate convictions for each contemporaneous penetration prevented the scoring of those penetrations as contemporaneous criminal activities under OV 12. However, while OV 12 could not be scored based on the multiple criminal sexual penetrations for which defendant was separately convicted, those contemporaneous convictions were scored in PRV 7; in the absence of those contemporaneous convictions, defendant would have been assessed two PRV points and his PRV level would have been B, instead of C. Thus, the two criminal penetrations contemporaneous with each sentencing offense constitute "an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range." MCL 769.34(3)(b). In focusing its analysis on the inability to score the multiple penetration under OV 12 because of the separate convictions, the trial court failed to acknowledge that, because defendant was separately convicted of them, these penetrations were taken into consideration in the scoring of the prior record variables.

Plaintiff argues that the trial court's upward departure was justified because the sentencing guidelines did not adequately account for the severity of the forceful abduction of the victim or of the extent of the psychological impact on the victim and her family. However, we note that the trial court made no mention of these factors as being inadequately accounted for by the guidelines or as justifying an upward departure.³ Rather, the trial court's departure was based on its belief that the OV 11 and OV 12 inadequately accounted for the multiple penetrations inflicted by defendant on the victim, which belief was based on a misapprehension of applicable law and failed to acknowledge that defendant's contemporaneous convictions were accounted for by the applicable prior record variable. Therefore, we conclude that the trial court did not articulate a substantial and compelling reason justifying its upward departure. We also note that a panel of this Court previously concluded, in defendant's prior appeal, that the severity of defendant's offense was accounted for by the applicable offense variables and that the trial court's general reliance on the circumstances of the offense – including that defendant abducted the victim from outside her home and through force and threats, compelled her to submit to his sexual assault – did not meet its obligation to articulate substantial and compelling reasons for an upward departure. *Miller, supra*, slip op at 9.

We are mindful that our Supreme Court has determined that a trial court did not abuse its sentencing discretion when, based upon considerations included in the sentencing guidelines, it imposed a sentence five years above the recommended minimum where the defendant's offense

³ The trial court did mention the "horror" that defendant committed, but did not mention the forceful abduction or psychological impact in this context.

variable score of 120 “vastly exceeded the 50 points necessary to reach the highest level of offense severity.” *People v Stewart*, 442 Mich 937; 505 NW2d 576 (1993). In *Stewart*, the defendant’s OV score was nearly two and one-half times the number of points necessary to reach the highest level of severity; here, defendant’s OV score was one and one-half times the maximum needed to reach the highest level of severity. However, we are unwilling to sua sponte employ that line of reasoning in this case. The trial court may consider this issue on remand and to the extent the court concludes that defendant’s scoring under OV11 justifies an upward departure from the sentencing guidelines, the trial court should specifically and completely state its reasons supporting its conclusion.

Because we do not find that the factors articulated by the trial court present substantial and compelling reasons for the upward departure, we need not address defendant’s assertion that his sentences are unconstitutional pursuant to the United States Supreme Court decision in *Blakely v Washington*, 542 US 296, 124 S Ct 2531; 159 L Ed 2d 403 (2004).

We vacate defendant’s sentences and remand for resentencing. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ William B. Murphy
/s/ Janet T. Neff